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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Joint written statement*/ submitted by Europe-Third World Centre, a non-governmental organization in general consultative status, and the American Association of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[29 June 2001]

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*/ This written statement is issued, unedited, as received in English, French and Spanish, from the submitting non-governmental organization(s).

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ACTIVITIES OF THE WORKING GROUP ON TRANSNATIONAL CORPORATIONS OF THE SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

I. In 1998, the Sub-Commission on the Promotion and Protection of Human Rights, duly concerned about the effect of the methods of work and the activities of transnational corporations on the enjoyment of human rights, decided to create a Working Group with the following six points mandate.

"1) to identify and examine the effects of the working methods and activities of transnational corporations...; 2) to examine, receive and gather information...; 3) to analyse the compatibility of the various international human rights instruments with the various investment agreements,...; 4) to make recommendations and proposals relating to the methods of work and the activities of transnational corporations in order to ensure that such methods and activities are in keeping with the economic and social objectives of the countries in which operate, and to promote the enjoyment of economic, social and cultural rights and the right to development, as well as civil and political rights; 5) to prepare each year a list of countries and transnational corporations, indicating, in United States dollars, their gross national product or financial turnover, respectively; 6) to consider the scope of the obligation of the States to regulate the activities have or are likely to have a significant impact on the enjoyment of human rights" (Sub-Commission Resolution 1998/8).

II. The frequent negative effects on human rights of the activities of transnational corporations and the delinquent or criminal character (as authors, instigators or accomplices) of certain activities of many of these corporations lead to the issue of submitting these corporations to an effective normative and jurisdictional framework. There is not an easy solution to this problem given that the transnational character of these corporations and the volatility and ubiquity of their activities result in serious difficulties to include them in national norms and jurisdictions. There are international norms, albeit with gaps, but no international jurisdiction competent to apply these norms directly to the companies. This problem appears to be the motivation of points 4 and 6 of the mandate conferred upon the Working Group.

III. The Working Group has dedicated a great part of its time in meetings to examining a project of directives for a voluntary code of conduct of the transnational corporations, presented by the United States member of the group, Mr. David Weissbrodt, entitled "Draft Universal Guideline for Companies", for which the last version is dated May 21, 2001. While this does not appear to be part of the mandate of the Work Group, it is an interpretation highly pertinent for discussion by this group.

The AAJ and CETIM deem that voluntary conduct codes (whose usefulness is highly relative, as demonstrated by experience) are private initiatives and as such are not part of the normative activities of the States, of any normative activities (agreement, resolution, declaration, etc.) or initiatives to promote norms (directives, Declaration of Principles, etc.) of intergovernmental organisms directly received by the States and indirectly by private entities. AAJ and CETIM consider that the elaboration of such codes is a task outside of the realm of an organism of the United Nations and more appropriate for a consultant contracted by a transnational society.

IV. Nevertheless, given that the project has been presented officially, accompanied by an introduction and a bibliography, it is appropriate for the Working Group to evaluate the project in some detail. First, some specific aspects were analyzed and then the essential contents of the project. The project includes in the "Definitions" all companies, national or transnational and as

such, ignores the specific character of transnational companies and their activities, which is precisely the objective of the study assigned by the Sub-Commission to the Working Group.

Article 1 of the project ignores the issue of prevention of human rights violations. Article 3 reduces the principle of equality to equality of opportunities, which are completely distinct concepts.

The sentence in Article 3 that reads "with a view towards eliminating discrimination" designates the right of non-discrimination the characteristic of a developing right instead of an immediately demandable right.

Article 4, which includes the phrase "handling demonstrations" in its second to last paragraph, constitutes a validation of the tendencies of privatization to maintain public order or that specific groups (private militia, for example) can interpret as "public order".

In the chapter that refers to workers, rights, both the text and the comments enumerate many direct rights, but it should be pointed out that when applying the rule of interpretation of "inclusio unius, exclusio alterius", the absence of some of the rights in this project that are recognized in the ILO Agreement is equivalent to their omission.

This chapter neglects to exclude employers, intervention in the formation and continuity of workers organizations. The absence of the principle of non-intervention in this chapter is notable. Also absent are guarantees for diverse trade union activities, including solidarity actions. In these cases, the "absence" can be interpreted as an exclusion.

Article 11 (which should be Article 6) is written in such a manner that it appears to award transnational companies with the extraordinary faculty of not recognizing national laws and authorities if they consider that they conflict with international standards relating to human rights. The correct principle should be that transnational corporations must observe national laws and authorities and respect the international standards relating to human rights.

Article 11b (which should be Article 6b) limits the right to education to just primary education, for no valid reason.

Article 17 (which should be Article 7) consecrates auto-regulation and the voluntary character of the proposed directives, as confirmed in the third paragraph of the comments to the article.

Article 17a (which should be 7a) complements the aforementioned article, establishing that the corporations will be in charge of auditing and overseeing the directives.

The third paragraph of the comments in this article states that corporations may accept independent controls "so long as the monitoring does not unduly interfere with work being performed". This means that a company may first accept external controls and then refuse them, as did Philip Knight, owner of Nike, when he declared that the controls "didn't allow him to earn a living"[1].

The last article, Article 17b (which should be 7b), establishes a type of safeguard clause in favour of the transnational corporations: "Nothing in the present guidelines shall be interpreted as restricting or adversely affecting the activities of companies". This obliterates everything previously stated and all that is left is the bottom-line philosophy of the project: **Trasnational**

[1] *Libération*, Paris, 16 and 17 may 2000.

corporations enjoy total freedom and are not obliged to follow norms or principles, but to respond to their own interests.

V. In the Introduction of the project, the author attempts to justify the voluntary nature of the directives being proposed, arguing that this is a first step and makes a comparison with the process of the States' adoption of norms of international law, which begins with the adoption of Declarations, then becomes more concrete until, over time, ends with Conventions or Treaties. The author indicates that if these directives become a base for a treaty, the implementation of such treaty should be analogous to the six existing human rights treaties and adds "but taking into account the particular concerns and attributes of the companies" (paragraph 60 of the Introduction). The author points out that for lack of consensus a mandatory code of conduct could not be adopted by the transnational companies, yet neglects to say that it was the rich countries that objected to the adoption of such a code. In paragraph 40 of the Introduction, the author states that "It would be unrealistic to suggest that human rights standards with regard to companies should immediately become the subject of treaty obligations".

The author forgets that while there is no specific mandatory code of conduct, human rights must be respected by transnational companies, including political, civil, economic, social, cultural and environmental rights. **These rights are already consecrated in pacts and related Conventions and in Declarations with the weight of jus cogens, mandatory for all persons, physical and legal, public and private including, of course, transnational corporations.**

It is therefore totally unacceptable to propose, in a document that hopes to be approved by the United Nations, that transnational corporations are apart from and above current international human rights law, or to accept that these companies can decide if they respect and accept the law or not, and when applying the law it is the companies themselves that decide which norms, how and when they apply or to accept that they also can "self-regulate" the transgressions that are committed.

The author of the project even proposes that the Directives, which confer upon transnational companies total freedom to decide whether or not to respect human rights, be used by Tribunals as a criteria to interpret the application of current norms (paragraph 52 of the Introduction). With this interpretive regulation, the judges should limit themselves to verify the conformity of the activities of transnational companies with the sovereign will of the very same companies and not their conformity with current judicial norms.

To accept this project of Directives, formulated in the name of "realism", would mean establishing a treatment of exceptions, contrary to equal treatment under the law, favouring immunity and impunity for transnational companies. This would be a giant step backwards in the promotion, universal application and progressive development of International Human Rights Law.

VI. The AAJ and CETIM consider that the proposal presented by Mr. Weissbrodt is outside of the functions of the Working Group, in its character as an organism of the system of the United Nations that should involve itself in proposing orientation to the States and the international community through the organisms of the system to promote universal respect for human rights and cannot and should not act as a consulting body for private companies, proposing voluntary codes adapted to particular interests.

On the contrary, the Working Group should be involved in complying with the mandate conferred upon it by the Sub-Commission, and within the context of points 4 and 6 of this mandate should try to establish directives or orientations for the international community and for

the States to achieve a framework for transnational corporations of current international and national norms relating to human rights (civil, political, economic, social, cultural and environmental) and to insure that these corporations respond to the appropriate jurisdictions in cases of transgression from the norms. In directive or orientations the Working Group should also propose ways to fill the normative and jurisdictional lacunas that exist on this area.

In order to comply with points 4 and 6 of the mandate and to establish directives and orientations, the Working Group could use as a base the Conclusions of the Seminar organized by AAJ and CETIM that was held in Celigny, Switzerland on May 4-5, 2001.